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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 769

ROSEMOND M. PHILLIPS,
Petitioner,

vs.

GEORGE W. PHILLIPS,
Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, the Third Appellate District Thereof

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Petitioner, by her counsel, prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal of the State of California, the Third Appellate District thereof, which judgment and opinion affirmed the judgment of the Superior Court of the State of California, in and for the County of Placer. The opinion of the aforesaid District Court of Appeal of the State of California was filed and entered July 16, 1957. A petition for rehearing was timely made and thereafter denied. A petition for hearing by the Supreme Court of the State of Cali-

fornia was filed with said court on August 20, 1957 and denied September 11, 1957. The time for filing the within petition for writ of certiorari was extended to and including February 8, 1958 by an order therefor duly signed by Associate Justice W. O. Douglas on December 7, 1957.

I.

OPINION BELOW

The judgment of the Superior Court of the State of California which was appealed to the aforesaid District Court of Appeal of the State of California is appended hereto and marked Exhibit 1. The opinion of the District Court of Appeal of the State of California is appended hereto and marked Exhibit 2.

II.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the terms and provisions of 28 U.S.C.A. § 1257(3) and it is asserted that in violation of the Fifth and Fourteenth Amendments to the United States Constitution petitioner has been deprived of property without due process of law and denied due process of law.

III.

QUESTIONS PRESENTED

1. Do not the words "due process" as used in the United States Constitution imply an impartial tribunal and an unbiased judge? In this regard when a jurist declares prior and during a trial that one of the parties litigant is "innocent" and that the equity is with said party litigant, has not the other party litigant been deprived of due process of law?

2. When a biased judge ignores the terms of a valid written contract and takes property away from a party litigant and attempts to give it to the other party litigant in favor of whom the bias exists, does not said deprivation violate the constitutional rights of the party litigant from whom the property is taken?

IV.

STATEMENT OF THE CASE

For purposes of clarity petitioner herein will be referred to as "wife" and the other party litigant as "husband". Husband and wife were married for ten years at the end of which period wife sought and received a divorce from husband upon the grounds of extreme cruelty. After the court granted the interlocutory decree of divorce to the wife repeated efforts were made by the husband to effect a reconciliation which efforts were unsuccessful until ten weeks after the final decree of divorce had been granted to the wife. Thereafter the parties were remarried. The day after the marriage the husband wrote an agreement in his own handwriting, dated the agreement May 23rd, 1946, and handed the agreement to the wife who thereupon signed it. The agreement was as follows:

> "May 23rd, 1946
>
> We, the undersigned, having remarried on May 22nd, 1946 hereby cancel the property agreement entered into February 26th, 1945, and hereby agree that all of our holdings of any kind shall remain and become community property."

The second marriage of the parties was not harmonious and the wife separated from her husand approximately two years thereafter and instituted an action for divorce.

Incident to the divorce proceedings the trial court remarked that the value of the community property appeared to be in excess of $100,000.00. It was proved to the satisfaction of the trial court that the parties hated each other and could under no circumstances live together. The trial judge attempted to force counsel for the wife to enter into a property settlement agreement as a condition precedent to the decision to be handed down by the trial court. Counsel for the wife refused so to do and as a consequence thereof the trial judge denied a divorce to both parties upon the grounds of recrimination and stated that each of the parties had wrongfully inflicted upon the other grievous mental suffering. Thereafter wife appealed to the District Court of Appeal and the decision was affirmed. A petition for rehearing was filed by wife and denied by the District Court of Appeal. A petition for hearing by the Supreme Court of the State of California was granted and the Supreme Court reversed the decision in the case of "Phillips v. Phillips," 41 Cal. (2) 869.

The anger of the trial court in being reversed and resulting from criticism directed toward him in the briefs of the wife was manifested in many ways. *PRIOR* to proceeding with the second trial the trial judge among other things stated as follows:

> "Of course the peculiar part of the Supreme Court's decision is that the *innocent* party is penalized by its decision, whereas the one who wouldn't cooperate is given a break from my decision. That's the trouble with the Supreme Court. They don't know on that point just exactly what it was talking about."

Again the aforesaid trial judge stated in open court:

> "I would say that the equity is with the husband, Mr. Phillips. I can't get away from it."

It was stipulated by and between the parties litigant that the transcript used in the first trial would be used in the second trial and during the second trial no additional competent evidence was adduced relative to the conduct of the parties, but notwithstanding said fact the court appraised all of the property lower than the lowest appraisal, excluded from the community assets valuable assets which by virtue of the property settlement agreement and the laws of the State of California were obviously community and should be divided between the parties, held that the husband was not guilty of extreme cruelty and that the wife was, and therefore awarded the divorce to the husband and denied the wife's prayer for divorce, and in addition thereto penalized the wife by allowing her merely twenty-five percent of a value lower than the lowest value of assets which did not include all community property.

During the course of the second trial the trial court insulted counsel for the wife, insulted the wife, abused all witnesses introduced on behalf of the wife, threatened counsel for the wife with contempt proceedings, refused to compel the husband to account to the wife for the management of the community assets notwithstanding the fact that the husband had had sole management and control thereof for a period of ten years, and by his conduct and statements clearly indicated that he was biased in favor of the husband, he was not impartial, and that under no circumstances did the wife at any time have a trial.

Certain aspects of the judge's conduct will be set forth herein. It is believed the only explanation thereof is that the element of colloquialism existed in this case and that the trial judge was incensed because his decision was reversed by the Supreme Court of the State of California. Under present practices in this state a trial judge is still compe-

tent to act in a second trial even though his decision is reversed. Incidentally, in this case counsel for the wife asked the trial judge to disqualify himself and thereafter instituted formal disqualification proceedings. Notwithstanding this fact the trial judge refused to disqualify himself and he was permitted to remain as a trial jurist in this case.

The entire record of both trials abounds with evidence in support of the assertion of wife that the trial judge was at all times biased and prejudiced against her and her counsel, that he pre-judged the case, and that his conduct constituted judicial misconduct to her extreme prejudice and in violation of her constitutional guarantees. The extremes to which he went to accommodate the husband and harass the wife and her witnesses can only be explained on the basis of the aforesaid bias and prejudice. The manner in which the trial judge totally disregarded competent evidence relative to the value of property and completely ignored legal principles relative to the contract rights of spouses and the constitutional guarantees afforded the owners of property is indicative of the attitude of the court. Irrespective of the personal opinions of the jurist the litigant has basic rights which cannot be arbitrarily cast aside by the whim of a trial court.

On November 22, 1954 during the discussion of methods of procedures on retrial relative to issues the trial court stated to counsel for wife:

> "Evidently we have never been able to get any satisfaction out of working with the parties as far as the property settlement was concerned. We are right back today where we were the day we finished the actual taking of testimony in this case. At that time I called them into the chambers and I told them these people couldn't live together and I tried with every means in

my power to get some settlement between the parties. That was stymied by *your own* course of conduct, whether you want to admit it or not. (Comment was directed to counsel for wife)"

The trial court took the position that counsel for the wife had not cooperated with the court in the prior trial and the record contains considerable colloquy relative to the explanation given to the trial court by said counsel. The court stated to counsel for the wife:

"We have been held up for four years. I understand you wouldn't come in and make a settlement with Mr. Chamberlain (counsel for husband) even after our last meeting."

Stated by Mr. Hearn to court:

"No, not on Mr. Chamberlain's terms."

The court to Mr. Hearn:

"I don't know his terms."

Mr. Hearn, stated to court:

"I think he should advise you of the ridiculousness of the terms."

The court to Mr. Hearn:

"I have heard that word ridiculous about every step made by Mr. Chamberlain and I don't agree with that."

A discussion took place between counsel for wife and the court relative to appraisal procedures and counsel for the wife stated to the court:

"This case has been going on for seven years. Therefore a few weeks won't make any difference."

The court responded thereto as follows:

"You are responsible for four years out of that seven years."

The following discussion took place between counsel for the plaintiff and the court. Mr. Hearn to the court:

"It will take me a little time to find it but to protect the plaintiff she will have to have Mr. Pugh here and this case has gone on for seven years and there are thousands of dollars involved."

The court stated to Mr. Hearn:

"It is to the disadvantage of your client, Mr. Hearn."

Mr. Hearn to the court:

"I resent that."

The court to Mr. Hearn:

"I know you do. I hate to say it but you force me to."

Mr. Hearn to the court:

"If you feel that way, if you feel that bias, I suggest that you disqualify yourself."

The court:

"Not at this *late* date. I have no bias against Mrs. Phillips, Mr. Hearn, I am talking about counsel for Mrs. Phillips. I did all I could and you opposed it."

A discussion was had in court relative to methods of dividing the property and incident thereto the court stated:

"No, it has been an abortive attempt to get any agreement. That is why we are back here today. You (counsel for wife) were asked to do that five years ago and if you had we wouldn't be here."

The effect of the court's conduct has been to deprive the wife of a sum in excess of $50,000.00 representing the true value of her share in the community property pursuant to the terms and provisions of the property settlement agreement. Irrespective of differences of opinion relative to the value of admitted community assets, the figures used by the court can under no circumstances be substantiated even by the application of simple principles of arithmetic. In addition thereto the low figure used by the court excluded life insurance policies, and automobile and other assets which

would add a clear $20,000.00 to the sum total of the admitted community assets.

The harsh treatment afforded the wife by the trial court, the antagonistic attitude of the court during the entire trial, the statements of the trial court to the parties litigant and their counsel relative to his bias and prejudice toward one of the parties, and the inequitable results of the decision of the court are indeed shocking. It is perhaps the opinion of the trial court that judicial discretion is a cloak which can conceal the true reasoning of a trial court and its opinion of a party litigant. Fortunately the aforesaid discretion is controlled and the basic constitutional rights of a party litigant will not permit the course of conduct that the trial court saw fit to pursue as herein outlined.

The entire conduct of the trial and every remark made by the trial judge was set forth in the petitions for hearing and rehearing and in the briefs incident to the appellate procedure. The District Court of Appeal commented in regard to the question of bias and prejudice as follows:

> "Lastly appellant contends that the trial judge was baised and prejudiced against her and her counsel and in addition thereto committed acts of prejudicial misconduct with the result that appellant was deprived of a fair trial. This contention is so lacking in merit that we do not feel called upon to discuss the many claimed assignments of prejudice and judicial misconduct."

It is indeed remarkable that the District Court of Appeal would make this statement in the face of the statements made by the trial court before the trial as follows:

1. "Of course, the peculiar part of the Supreme Court's decision is that the innocent party is penalized by its decision, whereas the one who wouldn't cooperate is given a break from my decision."

2. "I would say that the equity is with Mr. Phillips. I can't get away from it."

V.

LEGAL ARGUMENT

The facts herein set forth bring the case squarely within the confines of the guarantees afforded a citizen by the Fifth and Fourteenth Amendments to the United States Constitution relative to the deprivation of property without due process of law and denial of due process. It has been held that "due process" implies an *impartial* tribunal.

Inland Steel Co. v. National Labor Relations Board, 109 F.(2) 9.

It has also been held that a trial by a biased judge is not in conformity with "due process of law."

National Labor Relations Board v. Ford Motor Co., 114 F. (2) 905.

If in a case tried to a jury at the end thereof one of the jurors stated, "At the beginning of the trial and prior thereto my complete sympathy was for the plaintiff," no one would question that a new trial would be granted and that the parties litigant had been deprived of due process of law. If a juror must be impartial obviously a jurist must be impartial. It is impossible to justify the statements or conduct of the trial jurist in this case. The statements of the jurist indicate with the greatest amount of clarity his bias and prejudice and prove that the wife did not have a trial. Secondly, if there is any doubt relative to the significance of his statements the harsh results of his decision are the best proof of the fact that the wife at no time had a trial.

VI.

CONCLUSION

For the foregoing reasons the Supreme Court of the United States should issue a writ of certiorari in order that

this case may be reconsidered and decided commensurate with principles of law applicable thereto and in accordance with the constitutional guarantees incident to the Fifth and Fourteenth Amendments to the United States Constitution.

Dated: January 31, 1958.

Respectfully submitted,

REGINALD G. HEARN

PHILIP ADAMS

By REGINALD G. HEARN

Attorneys for Petitioner

(Appendix Follows)

Appendix

In the Superior Court of the State of California in and for the County of Placer

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No. 15113

Rosemond M. Phillips,	Plaintiff,
vs.	
George W. Phillips,	Defendant.

Filed Oct. 3 1955

INTERLOCUTORY DECREE OF DIVORCE

The above-entitled action came on regularly for retrial before the above-entitled Court—sitting without a jury—pursuant to the Order of the Supreme Court of the State of California, reversing the former judgment rendered by the above-entitled Court in this action and directing a retrial of said action. Plaintiff and cross-defendant, Rosemond M. Phillips, appearing in person and by her attorney, Reginald G. Hearn: the defendant and cross-plaintiff, George W. Phillips, appearing in person and by his attorneys, Chamberlain & Chamberlain, by T. L. Chamberlain and evidence, both oral and documentary, having been duly received, and the parties having entered into a stipulation in open Court, whereby it was duly stipulated and agreed that all of the evidence produced in the first trial of said action, and being the same evidence contained in the transcript on appeal

from the judgment rendered in the first trial of this action, should be, and become a part of the evidence in the retrial of this cause with the same force and effect as if the testimony and evidence contained in said transcript had been produced and given in the retrial of this action, and it having been further stipulated in open Court that either party would be entitled to, and should be permitted to introduce such additional evidence as was admissible, and such additional evidence having been offered and admitted, and the cause having been briefed by the respective parties and submitted to the Court for its decision, and the Court, being fully advised in the premises and having rendered its opinion and having thereafter and heretofore filed its Findings of Fact and Conclusions of Law.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I

That the annulment prayed for by the defendant and cross-plaintiff be, and the same is denied.

II

That the cancellation of the memorandum signed by the defendant and cross-plaintiff on the 23rd day of May, 1946, as set forth in paragraph XXI of the amended cross-complaint be, and the same is denied.

III

That a divorce on the grounds of extreme cruelty prayed for by the plaintiff and cross-defendant be, and the same is denied.

IV

That the defendant and cross-plaintiff, George W. Phillips, be, and he is hereby granted an interlocutory decree of

divorce from the plaintiff and cross-defendant Rosemond M. Phillips on the grounds of cruelty.

V

It is further ordered, adjudged, and decreed that under and by virtue of the agreement dated May 23rd, 1946, all property then owned by either party, or by both parties to this action, became the community property of the parties hereto, and that the residue of said property now remaining in the hands of either party and in the hands of both parties hereto, is all that certain real property known as the Sandy Beach Resort, situate in the County of Placer, State of California, particularly described as follows, to wit:

> Part of Lot 1 of Section 14, Township 16 North, Range 17 East, MDB&M, commencing on the north line of Lot 1 at a point located South 88° 33' West 540.42 feet from the northeast corner of Section 14; thence South 1354.26 feet; thence North 86° 57½' West 270.50 feet; thence North 1332.97 feet, more or less, to the north line of Section 14; thence North 88° 33' East 270.21 feet to the point of beginning. Also all land south of the above parcel lying between the east and west lines of said parcel continued South to the low water mark of Lake Tahoe; also known as Lots 18 and 18A of Agate Bay Subdivision, together with all improvements thereon or appurtenant thereto belonging.

Personal Property

The fixtures and furnishings in the building thereon and the fixtures and furnishings of the store situated on said property, and the stock in trade of said store.

The sum of $1,786.03 on deposit in banks; the sum of $400.00 in cash and the sum of $1,000.00 now due on current accounts.

All of which said property is now subject to the community obligations of the parties hereto amounting to the sum of $4,100.00.

VI

It is further ordered, adjudged, and decreed that the net reasonable market value of all of the said community property of the parties hereto, after deducting the community debts and obligations, will not exceed the sum of $69,000.00.

VII

It is further ordered, adjudged, and decreed that all of the community property of the plaintiff and cross-defendant, Rosemond M. Phillips, and the defendant and cross-plaintiff, George W. Phillips, in the final decree of divorce and on the entry thereof, be awarded to the defendant and cross-plaintiff, George W. Phillips, subject only to the payment to the plaintiff and cross-defendant, Rosemond M. Phillips, at the time of the entry of a final decree of divorce herein, the sum of Seventeen Thousand Five Hundred Dollars ($17,500.00), without interest; provided, however, that there shall be credited on said sum of $17,500.00 any sums hereafter paid by the defendant and cross-plaintiff, George W. Phillips, either as interest or principal on the Promissory Note and Deed of Trust given by the defendant and cross-plaintiff, George W. Phillips, to the plaintiff and cross-defendant, Rosemond M. Phillips, at the time of the first divorce between the parties, plaintiff and defendant herein, and in the event that said Promissory Note and Deed of Trust shall, not at the time of the entry of a final decree of divorce herein, be surrendered to the defendant and cross-plaintiff together with a written request for the reconveyance of the same, that then and in that event credit shall be

allowed on the $17,500.00 herein, provided to be paid at the time of the entry of a final decree of divorce herein, for the principal balance of the Promissory Note secured by said Deed of Trust hereintofore referred to and all unpaid interest now accrued, or to accrue thereon in the future.

VIII

This decree is an interlocutory decree, and when one year has expired after the entry of this decree, the Court on motion of either party, or on its own motion, may enter a final judgment of divorce restoring both of the parties hereto, to the status of single persons, and granting such other and further relief as may be necessary to a complete disposition of this action.

IX

That each of the parties hereto, shall pay their own costs as directed by the Supreme Court of the State of California in its decision and order rendered in December, 1953.

Dated this 1st day of October, 1955.

JAMES SNELL,

Judge of the Superior Court

In the District Court of Appeal
of the State of California
Third Appellate District

Civil No. 9038

Rosemond M. Phillips,
Appellant,

v.

George W. Phillips,
Respondent.

OPINION

WARNE, J. pro tem.*—This is an appeal from an interlocutory decree of divorce and an order denying alimony pendente lite.

In 1945 the appellant wife obtained an interlocutory decree of divorce from respondent on the ground of extreme cruelty. At that time the parties entered into a property settlement agreement, under the terms of which appellant conveyed to respondent as his separate property her interest in a resort at Lake Tahoe which the parties owned and operated, and respondent executed and delivered to appellant a promissory note in the amount of $15,000 secured by a deed of trust on the resort property. On March 6, 1946, a final decree of divorce was entered. On May 22, 1946, the parties remarried and agreed in writing to cancel the property settlement agreement and hold all their property as community property. However, appellant did not thereafter cancel the note or cause a reconveyance to be made under

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*Assigned by Chairman of Judicial Council.

the deed of trust but on July 19, 1948, filed this action for divorce on the ground of extreme cruelty. Respondent, by way of cross-complaint, sought an annulment or a divorce. After trial, the court found each to be guilty of extreme cruelty of substantially the same degree but held that neither was entitled to a divorce on the ground of recrimination. The Supreme Court held that the doctrine did not apply (*Phillips v. Phillips*, 41 Cal. 2d 869, 877 [264 P.2d 926]), and reversed the judgment, the court declaring that "On retrial, the court may determine whether one or both parties shall receive the divorce," and that the issues as to the validity of the property settlement agreement and the status of the property of the parties would "be decided on the retrial of the cause."

The parties disagree as to the effect of the reversal as to the issues to be retried. Appellant contends that the retrial was to be limited to those issues not determined at the first trial, that is, the property rights of the parties. On the retrial it was stipulated that all of the testimony introduced at the first trial of the action as set forth in the reporter's transcript would be received in evidence, and that either of the parties might offer such additional evidence as they desired. No additional evidence was offered by appellant as to the conduct of the parties. The respondent offered evidence of statements made by appellant during the first, as distinguished from the second, marriage of the parties. The statements were in effect that the appellant had only married respondent as a means of support for herself and daughter. The only other additional evidence presented was in respect to the property rights and the value thereof. The court found that the appellant was guilty of extreme cruelty and granted a divorce on that ground. It further found that it would be impossible to divide the community property in kind and therefore awarded it to the husband subject to the

payment by him of the sum of $17,500 awarded appellant, less any sum thereof paid on the above mentioned note executed by respondent pursuant to the property settlement agreement entered into at the time the parties were divorced in 1945. Th order provided that in the event the note was not surrendered to respondent by the time of the entry of the final decree of divorce, the amount of the note with the accrued interest thereon is to be credited against the $17,500 awarded to appellant in lieu of any interest in the community property.

The appellant contends that the trial court was bound by its finding in the prior trial that respondent was guilty of extreme cruelty, since the evidence as to extreme cruelty was the same at both trials. She claims that such finding entitles her also to a divorce and an equal division of the community property since the Supreme Court, in its opinion, stated that the findings were supported by substantial evidence. We do not agree with appellant. It seems clear to us that the decision on the prior appeal was concerned simply with the matter of whether the doctrine of recrimination applied in the light of the facts as disclosed by the evidence. The mere fact that the prior decision held that there was sufficient evidence to support the findings of cruelty, does not mean that the court intended it to be the law of the case. A reading of the opinion reveals that the court did not hold that the evidence necessarily required a finding that each party was guilty of extreme cruelty as a matter of law. Had the Supreme Court so held, it would not have stated that, "On retrial, the court may determine whether one or both parties shall receive the divorce." Except where the sufficiency of the evidence as a matter of law is involved, the doctrine of the law of the case does not give conclusive effect to a determination of questions of fact. As

stated in *Moore v. Trott*, 162 Cal. 268, at page 273 [122 P. 462]: "So well settled is the proposition that the doctrine of the law of the case, generally speaking, is applied only to the principles of law laid down by the court as applicable to a retrial of fact, that it does not embrace the facts themselves, • • • that no quotation from the authorities is necessary, • • •" (See also *Wallace v. Sisson*, 114 Cal. 42, 43 [45 P. 1000]; *Robinson v. Thornton*, 114 Cal. 275 [46 P. 79]; *Allen v. Bryant*, 155 Cal. 256, 258 [100 P. 704]; and *McNeely v. Connell*, 87 Cal. App. 87 [261 P. 754].) On the retrial of the case the trial court had the right to reconsider the credibility of the witnesses, weigh their testimony and arrive at a different conclusion. It is only where the sufficiency of the evidence to sustain the judgment depends upon the probative value or effect of the evidence itself (as distinguished from the credibility of witnesses), and there is no substantial difference in the evidence in the retrial, that the former decision is the law of the case. (3 Witkin on Procedure, § 213, p. 2424, citing *Estate of Baird*, 193 Cal. 225 at 234 [223 P. 974], and many other cases.) "But where the sufficiency depends upon credibility of witnesses, • • • it has been held that the former decision may not be law of the case though the evidence is substantially the same." (3 Witkin on Procedure, *supra*, p. 2425, citing cases.)

Nor is there any merit in appellant's contention that the court abused its judicial discretion in not finding that respondent was guilty of extreme cruelty. We have carefully examined the entire record to determine the conduct of the parties, and conclude that a finding that either party was, or was not, guilty of extreme cruelty would have ample support in the record, depending upon the weight which the trial judge gave to the testimony of witnesses. There is also substantial evidence to sustain the finding of the trial court that

the appellant, without cause of provocation, inflicted grievous mental suffering upon the respondent. "Whether in any given case there has been inflicted * * * 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule as to what particular probative facts shall exist in order to justify the finding of the ultimate facts of its existence can be given." (*LaMar v. LaMar*, 30 Cal. 2d 898 [186 P.2d 678].)

Appellant next contends that the trial court committed prejudicial error in determining the value of the community property assets. While the evidence as to the value of the assets is conflicting, still there is substantial evidence to sustain the court's finding as to value. The court, having concluded to grant the divorce to the respondent, acted within its legal discretion under the circumstances in awarding the appellant $17,500 in lieu of any other interest in the community property. It is not necessary for the court to do more than it did with reference to the community property. As stated by this court in *Thompson v. Thompson*, 136 Cal. App. 2d 539, at page 541 [288 P.2d 932]: "It was for the trial court to assign the community property in such proportions as it deemed just under all the circumstances. (Civ. Code, § 146, subd. 1.) It was not necessary that it be evenly divided. Since the trial court held appellant was not entitled to a divorce, the respondent was the 'innocent' party and could be awarded more than one-half of the community property." (Citing *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 873 [250 P.2d 598].) Nor was there any need to find as to the specific value of each item of the property. (*Pope v. Pope*, 102 Cal. App. 2d 353 [227 P.2d 867].) "Under various circumstances, an award of money to the wife in lieu of her

interest in the real and personal property of the community has been sustained." (*Johnston v. Johnston*, 33 Cal. App. 2d 90, 92 [91 P.2d 142], and cases cited therein.) In the instant case the court viewed the Sandy Beach Resort property and concluded that it could not be divided without depreciating the whole. Under the circumstances we cannot say that the trial court abused its discretion in so holding.

The appellant next contends that the court committed prejudicial error in not requiring respondent to account to her for the proceeds of the community property from July 11, 1948, to the date of the trial. There is no merit in this contention. The record discloses that the books and accounts were made available to appellant's counsel and the appraisers selected by her. It further appears that these books and accounts and the income tax returns were actually examined by appellant's witness Willmette for her. Also respondent was called as a witness under the provisions of section 2055 of the Code of Civil Procedure and examined at considerable length with reference to the community assets and the earnings therefrom. It seems to us that the community funds and the profits from the resort business were amply accounted for at the trial.

Lastly appellant contends that the trial judge was biased and prejudiced against her and her counsel, and in addition thereto committed acts of prejudicial misconduct with the result that appellant was deprived of a fair trial. This contention is so lacking in merit that we do not feel called upon to discuss the many claimed assignments of prejudice and judicial misconduct.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concurred.

[Filed]: July 16, 1957.